

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

NATIONAL CARGO BUREAU, INC.

Employer

and

Case 21-RC-20229

MARINE CLERKS ASSOCIATION, LOCAL 63,
INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act and seeks to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5. The following employees of the Employer constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time staff surveyors employed by the Employer at its 302 West 5th Street, San Pedro, California location; excluding all office clerical employees, administrative assistants, guards and supervisors as defined in the Act.¹

The sole issue under consideration is whether the Petitioner should be disqualified from representing staff surveyors due to the existence of a conflict of interest. With respect to this issue, the Employer contends that the petition should be dismissed on the ground that staff surveyors, in the performance of their job duties, monitor, inspect, report on and certify the performance of other employees currently represented by either the Petitioner or its affiliates. As such, the Employer contends that the Petitioner may, during the course of collective-bargaining negotiations, sacrifice the interests of the staff surveyors in order to protect the interests of the other bargaining units it currently represents. The Petitioner, on the other

¹ At the hearing, the parties stipulated that the unit is appropriate for the purposes of collective-bargaining.

hand, contends that there is no basis for finding that a conflict of interest exists.

EVIDENTIARY FACTS

The record establishes that the Employer is a New York corporation engaged in the independent marine surveying business at ports located throughout the United States, including the Port of Los Angeles in San Pedro, California - the operating location under consideration in this proceeding. To conduct its business operations at the Port of Los Angeles, the Employer employs an administrative assistant, a senior staff surveyor, and two staff surveyors.²

Staff surveyors perform a variety of tasks at the Port of Los Angeles on behalf of the Employer's clients who include terminal operators, insurance companies, steamship lines, and steamship agents. The performance of these tasks frequently requires staff surveyors to interface with and inspect work carried out by employees currently represented by the Petitioner and other International Longshore Workers Union ("ILWU") affiliates as well.

One of the staff surveyors' tasks involves inspecting hazardous material containers located on the dock and on the decks of ships. With respect to the former task, staff surveyors ascertain whether hazardous materials have

² The parties stipulated at the hearing that the Employer's sole senior staff surveyor, Captain Thomas A. Sheridan, is a supervisor under the Act and is, therefore, excluded from the petitioned-for unit. The parties further stipulated that the Employer's administrative assistant, Sandra Eberhardt, is also excluded from the unit.

been loaded or "stuffed" into the containers in compliance with applicable federal regulations. Staff surveyors also examine whether proper identifying labels have been affixed to the exterior walls of the containers subject to their review.

With respect to the involvement of other employees in this process, the record discloses that when staff surveyors arrive at the dock to inspect containers, they are led to the containers by yard clerks, who are represented by the Petitioner. As the record reveals, the involvement of yard clerks in the inspection process is limited only to the performance of the above task. The record further reveals that, within the past year, the work associated with loading the containers has been performed by non-ILWU workers. Staff surveyors do not have the authority to hire, fire, promote, transfer, or discipline these workers, nor assign them work.

As to the containers on the decks of ships, staff surveyors determine whether containers have been properly loaded, labeled, and secured, pursuant to the ship's cargo securing manual, so as to prevent shifting or dislodgment while in transit. The work associated with securing containers is performed by "lashers," who are represented by ILWU, Local 13. Although staff surveyors review lashers' work, staff surveyors lack the authority to hire, fire, promote, transfer, or discipline lashers, or assign their work.

The record further reveals that staff surveyors routinely meet with lashing bosses when inspecting containers located on the decks of ships. During these meetings, staff surveyors advise lashing bosses of deficiencies in the stability of the containers, and propose solutions to rectify the problem. Lashing bosses then have the discretion to either ignore or implement the corrective measures offered by staff surveyors. Lashing bosses with whom the staff surveyors confer are represented by an affiliate of the Petitioner.

At the conclusion of both types of inspections, staff surveyors summarize their findings in a written report which states whether federal regulatory requirements, as well as the cargo securing manual provisions, have been satisfied. The record reveals that reports prepared by staff surveyors do not address whether a particular employee properly performed his or her work.

In addition to container inspections, staff surveyors also inspect hazardous material stowage plans at terminals. Prior to a stowage plan inspection, the terminal offices provide the staff surveyors with a dangerous cargo manifest prepared by an office clerical employee and a stowage plan prepared by a vessel planner. The record reveals that the office clericals and vessel planners are represented by the Petitioner's clerical unit and the Petitioner at four of the six terminals where the Employer conducts business. Office clerical employees and vessel

planners are not represented by the Petitioner at the remaining two terminals.³

After receiving the dangerous cargo manifest and stowage plan, staff surveyors review the information contained in these documents to determine whether hazardous materials will be stored on the ship in accordance with federal regulations. The record reveals that staff surveyors inform office clerical employees of any mistakes discovered on the manifest. In turn, the office clerical employees make any necessary changes. Likewise, staff surveyors make vessel planners aware of any deficiencies in the vessel stowage plan along with recommended changes which, the record reveals, vessel planners are under no duty to implement. Although the inspection of manifests and stowage plans require surveyors to work closely with office clerical employees and vessel planners, the record reveals that staff surveyors have no authority to hire, fire, promote, transfer, or discipline them, nor assign their work.

The record also discloses that staff surveyors are required to provide hazardous materials training to employees represented by the Petitioner and other ILWU affiliates. Under federal law, longshore employees involved in the transport of hazardous materials are required to pass a written examination covering hazardous materials handling once every three years. The record reveals that staff

³ The record reveals that staff surveyors spend 50 percent of their

surveyors teach classes on hazardous materials handling and administer written tests on that subject. Staff surveyors lack the authority to take any adverse personnel action against those longshore employees who fail the written examination.

In carrying out their duties, staff surveyors are also assigned to conduct damage surveys, investigations of hazardous material accidents, and steel surveys on behalf of the Employer's clients. Damage surveys are performed on either terminals or ships, and require staff surveyors to inspect damaged cargo, ascertain, in some cases, the cause of the damage, and prepare a written report describing the nature of the property damage. In the preparation of their written reports, the record discloses that there have been occasions where staff surveyors have identified workers represented by ILWU affiliates as the cause of the property damage under consideration.

The record reveals that investigations performed in response to hazardous material accidents require staff surveyors to monitor the clean-up of the accidents, and document in an investigative report the people, agencies and costs involved. As with damage surveys, staff surveyors have identified workers represented by the Petitioner and other ILWU affiliates in the text of their investigative reports.

time performing work at the remaining two terminals.

Staff surveyors also perform steel surveys. During steel surveys, staff surveyors inspect the manner in which steel is discharged from a ship and subsequently stored in warehouses on the docks by ILWU-affiliated workers.

ANALYSIS AND CONCLUSION

Under firmly rooted Board precedent, the burden of establishing a conflict of interest sufficient to compel the dismissal of a representation petition is placed squarely on the party opposing a labor organization's qualification as a bargaining representative. Sidney Farber Cancer Institute, 247 NLRB 1 (1980); Highland Hospital, 288 NLRB 750 (1988). To satisfy this burden, the party opposing a union's qualification must demonstrate that the danger of a conflict of interest is *clear* and *present*. Alanis Airport Services, 316 NLRB 1233 (1995). Given the strong public policy favoring employees' free choice of a bargaining agent, the burden of proof in conflict of interest cases is a heavy one. Harbert Int'l Services, 299 NLRB 472 (1990).

The Employer maintains that a conflict of interest exists because staff surveyors monitor, inspect, report on, and certify the performance of other employees currently represented by the Petitioner and its affiliates. The Employer contends that, were the Petitioner to represent its two staff surveyors, such a relationship would:

1. jeopardize the Employer's rights;
2. violate the staff surveyors' duty of loyalty owed to the Employer; and

3. jeopardize the staff surveyors' collective-bargaining rights. The Employer relies primarily on four cases to reinforce this position. However, each of the cases fails to persuasively support the Employer's claim that a disqualifying conflict of interest exists in this matter.

The first case relied upon, Bausch & Lomb Optical Co., 108 NLRB 1555 (1954), is distinguishable inasmuch as its holding is predicated on factual circumstances which are not present in the instant matter. As the Employer correctly notes in its post-hearing brief, the union in Bausch & Lomb operated an optical business which was in direct competition with the employer whose employees it sought to represent. The Board ultimately disqualified the union on conflict of interest grounds, reasoning that a danger existed that the union would bargain to promote and protect its competitive business interests to the detriment of unit employees. Unlike Bausch & Lomb, the record in this matter is void of any evidence that the Petitioner possesses business interests which compete directly with the Employer's business. Thus, Bausch & Lomb fails to compel a finding that a conflict of interest exists.⁴

Also distinguishable from the instant matter is St. John's Hospital, 264 NLRB 990 (1982). In St. John's Hospital, the union sought to represent the employer's

⁴ For similar reasons, Harlem River Consumers Cooperative, Inc., 191 NLRB 314 (1971), Pony Express Courier Corp., 297 NLRB 171, and Garrison Nursing Home, 293 NLRB 122 (1989), also cited to by the Employer in its brief, do not sufficiently establish the existence of a disqualifying conflict of interest.

registered nurses. In addition to engaging in representational activities on behalf of its members, the union also operated a nurse registry service that placed nurses at health care facilities, including the employer's facility. Evidence adduced at the hearing showed that one of the union's registry offices referred 80 percent of its nurses to the employer's facility. In ruling on this matter, the Board dismissed the union's petition because of the apparent danger that the union would use its bargaining relationship to advance its business interests with the employer rather than to advance the interests of the bargaining-unit employees. In the present case, there is no evidence that the Petitioner holds any financial interests outside of its employee representative capacity that would potentially influence it to compromise the interests of the staff surveyors it seeks to represent.

Sierra Vista Hospital, Inc., 241 NLRB 631 (1979) is factually inapposite and, therefore, unpersuasive. The central issue before the Board in Sierra Vista Hospital was whether the union should be disqualified from representing nonsupervisory nurses when supervisors of the employer, or a third-party employer, actively participate in the union's internal affairs. While the Board did note that supervisory participation in a labor organization's internal affairs *may* impinge on the employees' right to single-minded

representation, the potential threat to employees' rights articulated in Sierra Vista Hospital is nevertheless not present in this matter. The two staff surveyors whom the Petitioner seeks to represent are not statutory supervisors. Moreover, there is no evidence in the record that suggests that the staff surveyors, or any other employees of the Employer, actively participate in the Petitioner's internal affairs. Thus, the "clear and present danger" as contemplated in Sierra Vista Hospital, is not present in this case.

The Employer's fourth citation, CBS, Inc., 226 NLRB 537 (1976), is unpersuasive as well. CBS, Inc., examines whether an employer could lawfully refuse to bargain with a certified bargaining representative on the grounds that an agent of a union that represented a competitor's employees, but did not represent the employer's employees, attended bargaining sessions as a member of the certified representative's negotiating team. Because the Petitioner has not yet been certified as the bargaining representative of the staff surveyors, nor has the composition of its bargaining team been revealed, CBS, Inc. is not relevant to the determination of whether a conflict of interest exists in the present case.

In furtherance of its claim that the Petitioner should be disqualified, the Employer also asserts that the proposed representative relationship would cause the staff surveyors to violate the duty of loyalty they owe to the

Employer. In its brief, the Employer contends that were a conflict to arise between the Petitioner and the Employer, the staff surveyors might disregard their duty of loyalty by colluding with other longshore workers represented by the Petitioner and its affiliates.

Contrary to the Employer's claim, I find no evidence in the record to support the Employer's assertion that the relationship between the staff surveyors and other longshore workers would cause the staff surveyors to breach their duty of loyalty. As Board case law confirms, the mere fact that the staff surveyors frequently interact with and review work performed by employees who are represented by the Petitioner and its affiliates, does not create a disqualifying conflict of interest. French Medical Hospital Center, 254 NLRB 711, 712 (1981) (refusing to disqualify union when registered nurses it sought to represent instructed and counseled nursing attendants and LVNs represented by an affiliate of the union).⁵ Nor will the Board presume that such a relationship will, ipso facto, precipitate a breach of the duty of loyalty or impair employees' integrity. Id. Thus, the Employer's claim lacks merit.

The Employer also objects to the processing of the instant petition on the grounds that the Petitioner's concurrent representation of both the staff surveyors and

⁵ The Employer's reliance on Teamsters Local 249, 139 NLRB 605 (1962) and Oregon Teamsters' Security Plan Office, 119 NLRB 207 (1957) are

other longshore workers will impair the staff surveyors' right to single-minded representation. During collective-bargaining negotiations, the Employer asserts that the Petitioner will sacrifice the interests of the staff surveyors, in favor of the other longshore workers it currently represents, by negotiating less favorable terms and conditions of employment. However, the Employer has failed to adduce any evidence or facts to support its concern that the Petitioner will abandon its obligation to single-mindedly advance the interests of the staff surveyors. In fact, the record is devoid of evidence concerning the Petitioner's bargaining objectives. As a result, the Employer's position is purely speculative. Thus, I find no basis to support the Employer's contention regarding the impairment of the staff surveyors' collective-bargaining rights. Alanis Airport Services, 316 NLRB 1233 (1995) (Board requires showing of a "clear and present" danger interfering with bargaining process); Detroit Newspaper Agency, 330 NLRB No. 78 (January 14, 2000) (alleged conflict of interest posed no threat to bargaining process).

As a further and final consequence of the Petitioner's representation of the staff surveyors, the Employer argues that its business operations will be negatively impacted. Specifically, the Employer bases its claim that the Petitioner should be disqualified on its

misplaced in light of the Board's holding in French Medical Hospital

perception that the Petitioner's representation of the staff surveyors will yield less efficient work production and cause the Employer's clients to flee. The Employer's grim forecast is only conjecture, unsupported by the record. The Employer, for instance, fails to identify any record evidence suggesting that the selection of the Petitioner as the bargaining representative would ultimately harm its operations. Moreover, the Employer has not provided any legal authority in its brief to substantiate its claim that the unsupported and speculative threat to its business operations justifies disqualifying the Petitioner from representing the staff surveyors.

Based on the foregoing, I find that the Employer has not met the burden of proof necessary to disqualify the Petitioner on conflict of interest grounds.

There are approximately 2 employees in the petitioned-for unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including

Center.

employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for

collective-bargaining purposes by **Marine Clerks Association, Local 63, International Longshore and Warehouse Union, AFL-CIO.**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v.

Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, two copies of an alphabetized election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in Region 21, 888 South Figueroa Street, 9th Floor, Los Angeles, California 90017, on or before August 25, 2000. No extension of time to file the list shall be granted, except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

NOTICE OF POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices to Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration

Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 10570. This request must be received by the Board in Washington by 5 p.m., EDT, on September 1, 2000.

Dated at Los Angeles, California, this 18th day of August, 2000.

/s/Victoria E. Aguayo
Victoria E. Aguayo
Regional Director, Region 21
National Labor Relations Board

339-7575-7500